U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 May 2005

CASE NO. 2004-BLA-5815

In the Matter of:

ROBERT L. MESSER,
Claimant

v.

CEDAR COAL COMPANY,
Employer

and

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:

S.F. Raymond Smith, Esquire
For the Claimant

David L. Yaussy, Esquire
For the Employer

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER-DENYING BENEFITS

This proceeding arises from a claim for benefits filed by Robert L. Messer, a former coal miner, under the Black Lung Benefits Act, 30 U.S.C. §901, *et seq*. Regulations implementing the Act have been published by the Secretary of Labor in Title 20 of the Code of Federal Regulations.[1]

[1] The Secretary of Labor adopted amendments to the "Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969" as set forth in Federal Register/Vol. 65, No. 245 Wednesday, December 20, 2000. The revised Part 718 regulations became effective on January 19, 2001. Since the current claim was filed on May 10, 2002 (DX 4), the new regulations are applicable (DX 30).

Black lung benefits are awarded to coal miners who are totally disabled by pneumoconiosis caused by inhalation of harmful dust in the course of coal mine employment and to the surviving dependents of coal miners whose death was caused by pneumoconiosis. Coal workers' pneumoconiosis is commonly known as black lung disease.

A formal hearing was held before the undersigned on December 2, 2004, in Charleston, West Virginia. At that time, all parties were afforded full opportunity to present evidence and argument as provided in the Act and the regulations issued. In summary, the record consists of the hearing transcript, Director's Exhibits 1 through 30 (DX 1-30), and Employer's Exhibits 1 and 2 (EX 1-2). Furthermore, the record was initially held open until January 21, 2005 for the submission of briefs (TR 20). Moreover, I issued an Order Granting Extension of Time, dated January 24, 2005, in which I extended the period for filing briefs until February 18, 2005.

The findings of fact and conclusions of law which follow are based upon my analysis of the entire record, including all evidence admitted and arguments made. Where pertinent, I have made credibility determinations concerning the evidence.

Procedural History

On July 10, 1985, Claimant, Robert L. Messer, filed an initial application for black lung benefits under the Act, which the District Director denied, in correspondence, dated January 6, 1986, on the grounds that Claimant had failed to establish any of the elements of entitlement (DX 2).[2]

On August 2, 1993, Claimant filed a second application for benefits under the Act (DX 1). Following a formal hearing held on January 17, 1995, Administrative Law Judge Stuart A. Levin issued a Decision and Order Denying Benefits, dated May 1, 1995 (DX 2). In summary, Judge Levin credited Claimant with 8 ½ years of coal mine employment, but also stated: "Out of those years, however, there were approximately two years consisting of periods of inactivity during which he was not actually exposed to coal dust." Furthermore, Judge Levin denied benefits on the grounds that Claimant had failed to establish the existence of pneumoconiosis, a totally disabling respiratory impairment to which coal mining was at least a contributing cause, and/or a material change in condition since the previous denial (DX 2, ALJ Levin Decision, dated 5/1/95).

On appeal, the Benefits Review Board issued a Decision and Order, dated January 30, 1996, in which it expressly affirmed Judge Levin's finding of 8 ½ years of coal mine employment as unchallenged. However, the Board remanded the case for further consideration of various other issues on the merits (DX 2, BRB Decision, dated 1/30/96).

Subsequently, Judge Levin issued a Decision and Order Upon Remand, dated September 5, 1996, in which Judge Levin found that the weight of the medical opinion evidence did not establish pneumoconiosis under §718.202(a)(4), and, therefore, pneumoconiosis could not be at least a contributing cause of total disability. Accordingly, Judge Levin, again, denied

[2] I note that the case file has commingled various documents from the prior claims in Director's Exhibits 1 and 2 (DX 1, 2).

benefits (DX 2, ALJ Levin Decision, dated 9/5/96). On appeal, the Benefits Review Board issued a Decision and Order, dated July 15, 1997, in which it affirmed Judge Levin's findings pursuant to §718.202(a)(4). Accordingly, the Board held: "Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718…(citation omitted), we affirm the administrative law judge's denial of benefits, and need not reach claimant's remaining arguments regarding the issue of total disability (DX 2, BRB Decision, dated 7/15/97). Claimant did not appeal nor take any further action within one year of the foregoing denial. Accordingly, the foregoing claims are finally denied and administratively closed (DX 28).

On May 10, 2002, Claimant filed the current application for black lung benefits under the Act (DX 4), which was awarded by the District Director in a Proposed Decision and Order, dated November 18, 2003 (DX 23) and in an "Initial Determination," dated January 6, 2004 (DX 26). Pursuant to Employer's timely request for a formal hearing (DX 25), the District Director referred this matter to the Office of Administrative Law Judges for adjudication (DX 28-30). As previously stated, a formal hearing was held on December 2, 2004, and the record was held open until February 18, 2005 for the submission of briefs.

Issues

At the formal hearing, the parties set forth the following contested issues:

I. Whether the miner worked at least 10 years in or around one or more coal mines?
II. Whether the miner has pneumoconiosis as defined by the Act and the regulations?
III. Whether the miner's pneumoconiosis arose out of coal mine employment?
IV. Whether the miner's disability is due to pneumoconiosis?
V. Whether the Claimant has dependents for purposes of augmentation?
VI. Whether the evidence establishes a material change in conditions per 20 C.F.R. §725.309?
VII. Whether the offset for the State of West Virginia Workers' Compensation benefits was properly calculated?

(TR 6-8).

For the purpose of this decision, however, I find that the primary contested issues are those involving the existence of pneumoconiosis, disability causation, and refiled claim. As outlined above, the denial of benefits of the most recent claim was based upon Claimant's failure to establish the existence of pneumoconiosis and/or disability causation. Accordingly, even if total disability were established, it would not constitute a change in an applicable condition of entitlement under 20 C.F.R. §725.309.

Findings of Fact and Conclusions of Law

I. Background

A. Coal Miner and Length of Coal Mine Employment

On the initial application for benefits form, filed on July 10, 1985, Claimant alleged 8 years of coal mine employment ending on March 14, 1984. Furthermore, Claimant stated that he left coal mine employment because "my lung condition became too disabling for me to continue working." (DX 2). On the application, dated August 2, 1993, Claimant claimed 11 years of coal mine employment ending on March 14, 1984, when he left the mines "due to injury." (DX 1). At the prior formal hearing, held on January 17, 1995 before Judge Levin, Claimant alleged 9 years and 4 months of coal mine employment; and, Employer conceded 5 ½ years of such employment (DX 2, 1/17/95-Hearing TR 21). As previously stated, in his Decision and Order Denying Benefits, dated May 1, 1995, Judge Levin credited Claimant with 8 ½ years of coal mine employment, while also stating that Claimant was not actually exposed to coal dust during approximately two of those years (DX 2, ALJ Levin Decision, dated 5/1/95, p. 2). Moreover, the Board affirmed the finding of 8 ½ years of coal mine employment in its Decision and Order, dated January 30, 1995 (DX 2, BRB Decision, dated 1/30/95, note 2).

On the current application form, Claimant alleged 10 years of coal mine employment ending on March 14, 1984, when he left the mines because of his "back injury." (DX 4). Based upon the District Director's calculations of Claimant's earnings, the District Director found that Claimant established 5.62 years of coal mine employment (DX 8). Thereafter, the District Director reported findings of "5.6" and "5" years of coal mine employment (DX 20, 23). At the formal hearing held before the undersigned on December 2, 2004, Claimant relied upon his testimony at the prior hearing regarding his coal mine employment history (TR 15).

Having carefully considered the entire record, I find that Claimant has failed to meet his burden of establishing at least 10 years of coal mine employment (DX 1, 2, 4, 5, 6, 7, 8). Moreover, I agree with the District Director's finding of 5.62 years based upon Claimant's earnings in conjunction with the annual industry wage survey by the Bureau of Labor Statistics (DX 8). Finally, even if I were bound by the Board's affirmance of Judge Levin's finding of 8 ½ years of coal mine employment, this discrepancy would be inconsequential for the purpose of rendering this decision.[3]

B. Timeliness of Filing

Claimant filed his current claim for benefits under the Act on May 10, 2002 (DX 4). The timeliness of this filing is not contested.

[3] Since benefits were denied in the prior claim, Employer is not collaterally estopped by its failure to contest Judge Levin's finding of 8 ½ years of coal mine employment. Accordingly, I am not bound by the Board's affirmance thereof, which was based upon the failure of the parties to appeal the coal mine employment finding (DX 2, BRB Decision, dated 1/30/95, note 2).

C. Responsible Operator

Employer, Cedar Coal Company, is the properly designated responsible operator in this case, under Subpart G, Part 725 of the Regulations (DX 1, 2, 5, 6).

D. Dependents

Claimant has two dependents for the purpose of possible augmentation for benefits under the Act; namely, his wife, Linda Kay Messer (nee Welsh) and his stepson, Jordan Scott Messer, who was born on April 11, 1990 (DX 1; TR 11).

E. Personal, Employment and Smoking History

Claimant was born on March 2, 1950. He completed a 10th grade education. As stated above, Claimant engaged in coal mine employment for approximately 5.62 years. He last worked as a coal miner on March 14, 1984, when he left the mines primarily due to a back injury. Claimant's last usual coal mine job was as a general inside laborer (DX 1, 2, 4, 5, 7).

Claimant testified that he has not returned to work since the prior hearing in 1995 (TR 10-11). Claimant appeared at the December 2, 2004 hearing with an oxygen tank, and he stated that he has been using it for about six years (TR 12). Claimant also takes various medications, such as inhalers, liquids, shots, muscle relaxers, and pain pills, for his breathing and back problems (TR 12-13). Claimant acknowledged that he had asthma as a child, and that, since the time he worked in the coal mines, doctors in every hospital have thought he has it. However, Claimant stated that he had outgrown his asthma when he was about 18 years old (TR 13-14, 17). Claimant testified that he receives benefits from the West Virginia Workers' Compensation Fund for permanent and total disability. Claimant stated that this is a second injury life award, which entails a 50% award for occupational pneumoconiosis and a 20% award for his back injury (TR 15-18; *see also* DX 9).[4]

The case file is somewhat conflicting regarding the exact extent of Claimant's cigarette smoking history. At the prior hearing held on January 17, 1995, Claimant acknowledged that he used to smoke 1 ½ to 2 packs per day for "about 18…15 to 18" years until October 1993. Furthermore, at that time, he conceded that he was still smoking, albeit only one or two cigarettes per week (DX 2, Hearing TR 13-14). However, even this significant cigarette smoking history, as conceded by Claimant, grossly understate his actual cigarette smoking history. I note that when Claimant was admitted to Thomas Memorial Hospital for dyspnea and cough, on September 20, 1993, he reportedly had "smoked 3-4 packs of cigarettes per day for 33 years, quit three months ago." (DX 1, formerly DX 34). Moreover, at the formal hearing on December 2, 2004, Claimant testified that he stopped smoking approximately 3 years ago (TR 14). Similarly, on January 16, 2003, Dr. Rasmussen reported that Claimant quit smoking in 2001, but noted that he smoked 2 to 3 packs per day beginning in 1966 (DX 14). Moreover, on a History & Physical Examination, dated September 3, 2003, Dr. Zaldivar reported that Claimant smoked two packs per day beginning in his 20's and "quitting two years ago." (DX 15).

[4] The State award is not binding herein, since the statutes, regulations, and medical evidence which underlie such an award are not the same as those which govern this Federal black lung claim.

However, in his report, dated October 5, 2003, Dr. Zaldivar noted a "high carboxyhemoglobin of a current smoker." (DX 15). Furthermore, Dr. Rasmussen testified at deposition, held on September 14, 2004, that when he examined Claimant on January 16, 2003, the carboxyhemoglobin level indicated recent exposure to carbon monoxide. Although Dr. Rasmussen did not rule out other possible causes for such a result, such as a poor automobile exhaust or home heating problem, he acknowledged that "cigarette smoking…would be a very common cause." (EX 2, pp. 6-7). In view of the foregoing, I find that the evidence clearly establishes that Claimant has a very significant cigarette smoking history.

II. New Medical Evidence

The medical evidence includes various chest x-rays, pulmonary function studies, arterial blood gases, and physicians' opinions, which were obtained after the final denial of the more recent prior claim.

A. Chest X-rays

The record contains interpretations of recent chest x-rays, dated January 16, 2003 (DX 14, 15) and September 3, 2003 (DX 15), respectively. Of the foregoing, only one reading is positive for pneumoconiosis under the classification requirements set forth in §718.102(b); namely, Dr. Patel's (1/0) interpretation of the January 16, 2003 film (DX 14).[5]

On the other hand, Drs. Spitz and Wiot interpreted the January 16, 2003 film as negative for pneumoconiosis (DX 15). Furthermore, Dr. Zaldivar read the September 3, 2003 chest x-ray as negative for pneumoconiosis (DX 15).

All of the above-referred physicians are B-readers. Moreover, Drs. Patel, Spitz, and Wiot are dual-qualified B-reader and Board-certified radiologists. Accordingly, the majority of the interpretations, including those by B-readers and/or Board-certified radiologist, are negative for pneumoconiosis. Therefore, I find that the preponderance of the x-ray evidence is negative for pneumoconiosis.

B. Pulmonary Function Studies

A claimant must show he is totally disabled and that his total pulmonary disability is caused by pneumoconiosis. The regulations set forth criteria to be used to determine the existence of total disability which include the results of pulmonary function studies and arterial blood gas studies.

The record contains pulmonary function studies, dated January 16, 2003 (DX 14) and September 3, 2003 (DX 15), respectively. Both studies were administered before and after bronchodilator. Claimant's found height is approximately 68.5 inches. This represents the average of the heights reported by Dr. Rasmussen (69") and Dr. Zaldivar (68"). All of the pulmonary function studies (before and after bronchodilator) are qualifying under the criteria

[5] Dr. Binns, a B-reader and Board-certified radiologist, reread the January 16, 2003 x-ray for quality purposes only, and reported "1" film quality (*i.e.,* "Good"). (DX 14).

stated in 20 C.F.R. Part 718, Appendix B. Therefore, I find that the recent pulmonary function studies establish the presence of a total (pulmonary or respiratory) disability.

C. Arterial Blood Gas Studies

Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The record includes recent arterial blood gas studies which were administered (at rest) on January 16, 2003 (DX 14) and September 3, 2003 (DX 13), respectively. Neither of the recent blood gas tests are qualifying under the regulatory standards set forth in 20 C.F.R. Part 718, Appendix C. Accordingly, I find that the recent arterial blood gas evidence does not establish the presence of a totally disabling pulmonary or respiratory impairment.

D. Physicians' Opinions

The record contains the recent medical opinions of Drs. Rasmussen (DX 14; EX 2), Zaldivar (DX 15), and Altmeyer (EX 1), which were submitted in conjunction with the current claim.

Dr. Donald L. Rasmussen, a B-reader who is Board-certified in Internal Medicine, Forensic Examiners, and Forensic Medicine, as well as a Senior Disability Analyst with extensive experience in pulmonary medicine, examined Claimant on January 16, 2003 (DX 14). Dr. Rasmussen's findings are set forth in a U.S. Department of Labor form report, and a three-page typewritten report (DX 14). Dr. Rasmussen reported 5 years of exposure to machine oils while working in a tool and dye manufacturing facility, and, a 12-year coal mine employment history ending in 1985. Furthermore, Dr. Rasmussen described Claimant's coal mine work as entailing "considerable heavy and some very heavy manual labor." As previously stated, Dr. Rasmussen also reported a cigarette smoking history of 2-3 packs per day beginning in 1966 and ending in 2001. He also set forth Claimant's medical history, subjective complaints, findings on physical examination, and clinical test results. Dr. Rasmussen cited the positive (1/0) reading by Dr. Patel, pulmonary function studies which revealed severe, partially reversible obstructive impairment, minimal resting hypoxia on blood gas testing, and "normal" total lung capacity and single breath carbon monoxide diffusing capacity. In summary, Dr. Rasmussen stated:

> Overall, these resting studies indicate moderately severe loss of lung function. The patient does not retain the pulmonary capacity to perform his last regular coal mine job.
>
> The patient has a significant history of exposure to coal mine dust. He has x-ray changes consistent with pneumoconiosis. It is medically reasonable to conclude the patient has coalworkers' (sic) pneumoconiosis which arose from his coal mine employment.
>
> The patient has multiple risk factors including coal mine dust exposure, machining oil exposure and cigarette smoking. He also has a history of childhood asthma and a history consistent with hyperactive airways disease. All contribute to Mr. Messer's loss of lung

function. His occupational exposures including his coal mine dust exposure contributed significantly to his impaired lung function.

(DX 14).

In a supplemental letter, dated May 15, 2003, Dr. Rasmussen responded to an inquiry from Ms. Hope Crews, a claims examiner for the U.S. Department Of Labor, in which Dr. Rasmussen was asked whether his opinion would change even if Claimant only had a 5.6 year history of coal mine employment. Dr. Rasmussen stated, in pertinent part:

> Although 5.6 years of coal mine employment is a relatively short time to acquire coalworkers' (sic) pneumoconiosis, it is sufficient with sufficiently intense dust exposure in a susceptible host to acquire coalworkers' (sic) pneumoconiosis. Mr. Crews (sic)[6] also has a history of exposure to other potentially damaging substances such as machine oil.
>
> It is my opinion that 5.6 years of coal mine employment is sufficient as above to acquire coalworkers (sic) pneumoconiosis.

(DX 14).

Dr. Rasmussen also testified at a deposition held on September 14, 2004 (EX 2). As previously stated, Dr. Rasmussen reported a cigarette smoking history of 2-3 packs per day from 1966 to 2001, and, that the carboxyhemoglobin level found on January 16, 2003 was consistent with ongoing cigarette smoking among other possible causes (EX 2, pp. 6-7). Furthermore, Dr. Rasmussen had initially reported an inflated coal mine employment history of 12 years, but he subsequently stated that his opinion would not change when told by the Department of Labor that Claimant had only established 5.6 years of such employment (EX 2, p. 5). However, at deposition, Dr. Rasmussen modified his opinion. Specifically, Dr. Rasmussen stated that coal mine dust exposure for 5.6 years was *not* a significant contributing factor, but rather that it only contributed "minimally." (EX 2, pp. 9-10). Moreover, Dr. Rasmussen acknowledged that Claimant's extensive cigarette smoking history "could adequately describe (sic) all of his chronic obstructive pulmonary disease," and that he cannot determine how much was due to pneumoconiosis (EX 2, pp. 10-11). Furthermore, Dr. Rasmussen opined that asthma could be the most significant cause of Claimant's impairment, and that his (non-coal mine) occupational exposure to machining oil could have contributed minimally to Claimant's disability (EX 2, pp. 12-15). Moreover, Dr. Rasmussen acknowledged that there are no medical tests which he conducted or physical findings that he made which would specifically ascribe Claimant's impairment to coal dust exposure rather than some other cause (EX 2, pp. 12-13). In addition, Dr. Rasmussen testified that he couldn't even say for sure whether Claimant has pneumoconiosis or that he has impairment due to cigarette smoking (EX 2, pp. 20). On the other hand, Dr. Rasmussen also testified that he believes that Claimant has pneumoconiosis based upon Dr. Patel's positive x-ray reading, even though it was inconsistent with own B-reading of the same film (EX 2, pp. 20-22).

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[6] Although Dr. Rasmussen apparently confused the name of the claims examiner and Claimant, the substance of the letter indicates that Dr. Rasmussen was addressing issues involving the Claimant.

Dr. George L. Zaldivar, a B-reader who is Board-certified in Pulmonary Diseases, Internal Medicine, Sleep Disorder, and Critical Care Medicine, examined Claimant on September 3, 2003 (DX 15). In his "History and Physical Examination" report on that date, Dr. Zaldivar set forth Claimant's chief complaint of shortness of breath and back problems, history of present illness, past medical history, work history, personal and social history, family and personal illnesses, review of systems, and findings on physical examination. Claimant reportedly worked in the coal mines for nine years ending in 1984. As previously stated, the past medical history included a two packs per day cigarette smoking history, which began in his 20's and purportedly ended two years ago [*i.e.,* 2001]. In summary, Dr. Zaldivar stated:

IMPRESSION:

1. Asthma which is severe.
2. Morbid obesity.
3. Symptoms and findings of obstructive sleep apnea, notwithstanding his report of a negative sleep apnea test.
4. Peripheral edema.
5. Back pain.

(DX 15).

In a report, dated October 8, 2003 (DX 15), Dr. Zaldivar discussed the History & Physical Examination report, and, the laboratory information which he obtained from Claimant during the September 3, 2003 examination. Furthermore, Dr. Zaldivar also cited other records. In summary, Dr. Zaldivar stated:

My own findings are as follows:

1. Summary of the history and physical examination as listed under "Impression."

2. High carboxyhemoglobin of a current smoker.

3. Mild resting hypoxemia.

4. Normal total lung capacity with mild airtrapping by lung volume.

5. Mild diffusion impairment with normal DL/VA.

Following his further discussion and analysis of the available evidence, Dr. Zaldivar concluded:

1. There is no evidence of pneumoconiosis nor any dust disease of the lungs.

2. There is a pulmonary impairment present. The pulmonary impairment is asthma which is a disease of the general population, unrelated to coal mining or pneumoconiosis.

3. As of the time of my last examination, Mr. Messer was sufficiently impaired to prevent the performance of his usual coal mining work. This impairment was due to a combination of restriction of his vital capacity by obesity as well as by airtrapping in the lungs. The airtrapping is the result of asthma, while the obesity, if course, is the result of excessive weight. Neither one of these conditions are in any way related to his previous occupation as a coal miner. He may have some degree of emphysema, as shown by the mild reduction of diffusing capacity. However, the reduction of diffusion capacity may also be the result of the low forced vital capacity caused by the airtrapping and by the obesity, given that the DL/VA is normal. Emphysema, if present, is entirely the result of his lifelong history of smoking, which unfortunately he has continued up to the date of my last examination of Mr. Messer of 09/03/2003.

4. Even if Mr. Messer were found to have pneumoconiosis, which is extremely unlikely given the very few number of years worked in the coal mines and the absence of any radiographic evidence of dust deposition in the lungs, my opinion regarding the physiological abnormalities causing the pulmonary impairment at this time would remain the same as I have given here, for the reasons I have given.

(DX 15).

Dr. Robert B. Altmeyer, a B-reader who is Board-certified in Internal Medicine and Pulmonary Diseases, issued a report, dated November 4, 2004, in which he reviewed and analyzed the available evidence (EX 1). Based upon the foregoing, Dr. Altmeyer stated that Claimant "does not have pneumoconiosis or any condition caused by coal dust exposure." Although Dr. Altmeyer opined that Claimant suffers from a pulmonary impairment which would preclude coal mine work, except for a purely sedentary job, he related this disabling impairment to Claimant's obesity and the effects of chronic asthma. In addition, Dr. Altmeyer stated that Claimant's "cough with sputum production, as well as his symptomatology, are due to naturally occurring asthma, which has been aggravated by long-term smoking. Finally, Dr. Altmeyer concluded:

> In summary, I believe that there is no evidence in the medical records, which I reviewed, that this man has any occupationally related disease of the lungs as a result of the inhalation of dusts in coalmines for the reasons outlined above. My opinions in this report are given within a reasonable degree of medical certainty.

(EX 1).

Discussion and Applicable Law

Pneumoconiosis

Section 718.202 provides four means by which pneumoconiosis may be established. Under §718.202(a)(1), a finding of pneumoconiosis may be made on the basis of x-ray evidence. As stated above, the majority of the interpretations, including those by B-readers and/or Board-

certified radiologists, are negative for pneumoconiosis. Accordingly, Claimant has failed to establish the presence of pneumoconiosis pursuant to §718.202(a)(1).

Under §718.202(a)(2), a finding of pneumoconiosis may be made on the basis of biopsy or autopsy evidence. In the absence of any such evidence, this subsection is not applicable.

Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found applicable. In the instant case, the presumption of §718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis. Section 718.305 is inapplicable to claims filed after January 1, 1982. Finally, the presumption of §718.306 does not apply to claims where the miner died after March 1, 1978. Therefore, the Claimant cannot establish pneumoconiosis under §718.202(a)(3).

Under §718.202(a)(4), a determination of the existence of pneumoconiosis may be made if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in §718.201. Pneumoconiosis is defined in §718.201 as a chronic dust disease of the lung, including respiratory or pulmonary impairments arising out of coal mine employment. This definition includes both "Clinical Pneumoconiosis" and "Legal Pneumoconiosis." *See* 20 C.F.R. §718.201(a)(1) and (2).

As outlined above, the case file includes the recent medical opinions of Drs. Rasmussen (DX 14; EX 2), Zaldivar (DX 15), and Altmeyer (EX 1). Of the foregoing, only Dr. Rasmussen arguably diagnosed pneumoconiosis and/or attributed Claimant's respiratory or pulmonary impairment, at least minimally, to coal mine dust exposure. Notwithstanding Dr. Rasmussen's lack of Board-certification in pulmonary medicine, I find that his qualifications are roughly comparable to those of Drs. Zaldivar and Altmeyer, who are both Board-certified pulmonary specialists. Therefore, my determination herein is not based upon the relative credentials of the respective physicians. However, in view of Dr. Rasmussen's ambiguous, equivocal, and conflicting deposition testimony, I find that his opinion is that his overall opinion regarding the pneumoconiosis and disability causation issues is entitled to no weight. Moreover, I find that the opinions of Drs. Zaldivar and Altmeyer are better reasoned and documented, and more consistent with the credible, objective evidence, including the negative x-ray evidence, Claimant's minimal coal mine employment history, his longstanding history of asthma, and his extensive cigarette smoking history. Accordingly, I find that the clear preponderance of the credible medical opinion evidence is negative for pneumoconiosis. Therefore, I find that Claimant has failed to establish the presence of (clinical or legal) pneumoconiosis under §718.202(a)(4), or by any other means.

I have also weighed all the relevant evidence together under 20 C.F.R. §718.202(a) to determine whether the miner suffered from pneumoconiosis. As stated above, the clear preponderance of the x-ray interpretations and medical opinion evidence is negative for pneumoconiosis. Accordingly, I find that pneumoconiosis has not been established under 20 C.F.R. §718.202(a). *See, Island Creek Coal Co. v. Compton*, 211 F. 3d 203, 2000 WL 524798 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams,* 114 F. 3d 22 (3d Cir. 1997).

Since Claimant has failed to establish the presence of pneumoconiosis, he has also failed to establish disability causation under §718.204(c). Moreover, as stated above, even Dr. Rasmussen testified that coal mine dust only contributed minimally to Claimant's overall pulmonary impairment. Furthermore, as outlined above, I find that the better reasoned medical opinions of Drs. Zaldivar and Altmeyer establish that pneumoconiosis and/or coal mine dust exposure did not play any role in the miner's respiratory or pulmonary condition.

Conclusion

In summary, Judge Levin denied the most recent prior claim based upon his finding that Claimant had failed to establish the existence of pneumoconiosis and/or disability causation. Accordingly, Judge Levin did not address the other elements of entitlement (DX 2, ALJ Levin, Decision, dated 9/5/96). Moreover, the Board expressly affirmed Judge Levin's finding that Claimant failed to establish the existence of pneumoconiosis. Since this is a requisite element of entitlement, the Board affirmed the denial of benefits without addressing other arguments raised by Claimant regarding the total disability issue (DX 2, BRB Decision, dated 7/15/97).

Since I find that Claimant has still not established the presence of pneumoconiosis under §718.202(a), and that was the basis for the final denial of the prior claim, Claimant has failed to establish a change in the miner's physical condition within the meaning of 20 C.F.R. §725.309(d)(2),(3).[7] In view of the foregoing, Claimant is not eligible for benefits under the Act and regulations.

ORDER

It is ordered that the claim of Robert L. Messer for benefits under the Black Lung Benefits Act is hereby **DENIED.**

A

RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order, by filing a notice of appeal with the ***Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601.*** A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room B2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

[7] The "total disability" issue was not the basis for the denial of the prior claim. Therefore, even assuming that the physicians' opinions, in conjunction with the qualifying pulmonary function studies, warrant a finding of total disability herein, it would not establish a change in the miner's physical condition under §725.309(d)(2),(3). Moreover, as discussed in my analysis of the "pneumoconiosis" issue, there is no credible medical opinion evidence which establishes that Claimant's total disability, if found, is due to pneumoconiosis. *See* 20 C.F.R. §718.204(c).